Supreme Court, U. S.
FILED
APR 25 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1532

FRANK A. HALL ET AL.,
PETITIONERS,

v.

MORRIS MORGAN,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
ROBERT V. GRECO,
Assistant Attorney General,
Criminal Bureau,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions	2
Statement of the case	3
A. Prior proceedings	3
B. Statement of the facts	4
Reasons for granting the writ	6
I. An instruction by the trial judge can adequately cure any prejudice arising from the questioning of a defendant concerning his silence at arrest and declaration of a mistrial is not constitutionally required	6
II. The Rule of Doyle v. Ohio should not be retroactively applied	10
Conclusion	11
Appendix A: Opinion of the United States Court of Appeals for the First Circuit	1a
Appendix B: Memorandum and order of United States District Court for the District of Massachusetts	16a
Appendix C: Opinion of Supreme Judicial Court for the Commonwealth	22a

Table of Authorities Cited.

Cases.

Arizona v. Washington, ____ U.S. ____, 46 U.S.L.W. 4127 (February 21, 1978) 8

Bruno v. United States, 308 U.S. 287 (1939) 9

Commonwealth v. Morgan, ____ Mass. ____, Mass. Adv. Sh. (1975) 3635, cert. denied, 427 U.S. 905 (1976) 1, 3, 4, 7

Doyle v. Ohio, 426 U.S. 610 (1976) 2, 6, 7, 8, 9, 10

Griffin v. California, 380 U.S. 609 (1965) 10

Johnson v. New Jersey, 384 U.S. 719 (1966) 10

Lakeside v. Oregon, ____ U.S. ____, 46 U.S.L.W. 4248 (March 22, 1978) 9

Morgan v. Hall, 569 F. 2d 1161 (1st Cir. 1978) 1, 5, 8

Reid v. Riddle, 550 F.2d 1003 (4th Cir. 1977) 9

Tehan v. Shott, 382 U.S. 406 (1966) 10

United States v. Anderson, 498 F.2d 1038 (D.C. Cir. 1974) 9

United States v. Hale, 422 U.S. 171 (1975) 9, 10

United States v. Impson, 531 F.2d 274 (5th Cir. 1976) 8

United States v. Johnson, 558 F.2d 1225 (5th Cir. 1977) 8

Constitutional and Statutory Provisions.

United States Constitution

Fifth Amendment 2

Fourteenth Amendment 3

28 U.S.C. § 1254(1) 2

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. .

FRANK A. HALL ET AL.,
PETITIONERS,

v.

MORRIS MORGAN,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the Court of Appeals is reported at 569 F.2d 1161 (1st Cir. 1978) (Appendix A). The memorandum and order of the District Court is not reported (Appendix B). The opinion of the Supreme Judicial Court for the Commonwealth (Appendix C) is reported at Mass. Adv. Sh. (1975) 3635, *cert. denied*, 427 U.S. 905 (1976).

Jurisdiction.

The judgment of the court below was entered on January 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the asking of questions violative of the rule in *Doyle* v. *Ohio*, 426 U.S. 610 (1976), constitutionally requires automatic declaration of a mistrial even though the incident was minor, counsel's objection was sustained, and the trial judge not only instructed the jury to disregard the question but impressed upon the jury that the defendant was under no obligation to speak to the police.

2. Whether the rule enunciated in *Doyle* v. *Ohio*, *supra*, is to be retroactively applied.

Constitutional Provisions.

Fifth Amendment.

". . . [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .."

Fourteenth Amendment.

Section 1. ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

A. Prior Proceedings.

On May 8, 1974, the petitioner was indicted in the state Superior Court (Suffolk County) for rape, committing an unnatural and lascivious act, kidnapping, sodomy, and assault and battery. On September 17, 1974, after a trial before a judge and jury, he was found guilty of rape (receiving a sentence of 12-15 years), committing an unnatural act (concurrent sentence of 4-5 years), and assault and battery (placed on file). Those convictions were unanimously affirmed by the Supreme Judicial Court. *Commonwealth* v. *Morgan*, ____ Mass. ____, Mass. Adv. Sh. (1975) 3635.

After this Court denied his application for a writ of certiorari, 427 U.S. 905 (1976), the petitioner filed a petition for a writ of habeas corpus in the District Court; his petition was dismissed on July 15, 1977. A motion for a certificate of probable cause was subsequently allowed, and on January 26, 1978, the First Circuit ordered that the writ shall issue unless within 90 days the Commonwealth either began to retry the petitioner or applied for a writ of certiorari.

B. Statement of the Facts.

The facts were outlined by the Court of Appeals at pages 2 through 7 of its opinion (App. B, *infra*, pp. 2a-7a). To summarize them briefly, the victim, Barbara Palkey, testified that on March 23, 1974, as she was leaving a nightclub on Lansdowne Street in Boston the petitioner "approach [her] from the rear . . . [and] asked [her] if he could walk with [her]" (Tr. 26). She "quickened [her] pace" (Tr. 26); "he kept up with [her]" (Tr. 26). At her car he "stated he wanted a ride. He told [her] to open the door" (Tr. 27). Afraid, she did so; he got in. Following his direction she drove him to his apartment on Exeter Street (Tr. 27).

"[A]s [she] turned onto Exeter Street, he grabbed [her] by the back of the neck and dug his nails in and said, 'Pull in the alley or I'll kill you here'" (Tr. 27). She did so. She then offered him jewelry and money. "He said he didn't want anything that [she] had, he was just going to rape [her]" (Tr. 28). After further threats, they went to his apartment (Tr. 31) where he proceeded to rape her three times (Tr. 32-33) and commit other sexual acts (Tr. 33-34). Later, he punched her, fracturing her jaw (Tr. 36).

When she finally managed to get away, she called a neighbor and complained that she had been raped (Tr. 38). The neighbor also testified at the trial (Tr. 125-130).

The petitioner testified that he met Miss Palkey at the nightclub, where she offered to have sex with him for money (Tr. 183-184). They then went to his apartment and engaged in sexual conduct (Tr. 192-193). On direct examination, the petitioner further "testified that [Miss Palkey] tried to steal his television set from his apartment . . . and that he woke up and stopped her." Mass. Adv. Sh. (1975) at 3643 (App. C, *infra*, p. 28a).

During the cross-examination of the petitioner, the following exchange occurred (569 F.2d at 1164-1165; App. A, *infra*, pp. 6a-7a; App. B, pp. 18a-19a; App. C, pp. 28a-29a):

"XQ. Did you when this was over, did you report this to the police?

"A. No.

"XQ. Did you make any attempt to communicate this information to the police?

"A. No.

"XQ. Did you tell Detective Rufo when he came for you?

"A. No.

"XQ. Did you mention anything about that to him?

"A. No.

"Mr. Banks: I object.

"The Court: Sustained.

"XQ. Did you mention to anyone, to any one of the police that you happened to see —

"Mr. Banks: I object. May I approach the bench.

"The Court: Yes.

"*At the Bench*:

"Mr. Banks: Your Honor, May it please the Court, I am going to move for a mistrial — he has three times entered that area after objection.

"The Court: What do you say?

"Mr. O'Neil: Your Honor, I merely asked that since he is claiming the woman was a prostitute and committing a crime, did he report that to the police.

"The Court: I will sustain the objection.

"Mr. Banks: Exception.

"THE COURT: I would keep away from that, because it's a very fine line. He was under no obligation to say anything.

"MR. O'NEIL: I know that.

"*In Open Court*:

"THE COURT: I should tell the jury that when the defendant was arrested, one of the rights that he has is the right to remain silent.

"He is under no obligation to speak to the police.

"And, therefore, the question: Did you tell the police this or that — that is really not proper. And I will ask you to exclude it from your mind.

"He was under no duty to tell the police anything."

Reasons for Granting the Writ.

I. AN INSTRUCTION BY THE TRIAL JUDGE CAN ADEQUATELY CURE ANY PREJUDICE ARISING FROM THE QUESTIONING OF A DEFENDANT CONCERNING HIS SILENCE AT ARREST AND DECLARATION OF A MISTRIAL IS NOT CONSTITUTIONALLY REQUIRED.

What is not involved here is a difference of opinion between the state and federal courts over correct constitutional standards. Indeed, in this case the original trial judge ruled correctly even before *Doyle* v. *Ohio*, 426 U.S. 610 (1976), was decided. What is involved, however, is a difference of opinion over the appropriate remedy in the case of an improper question concerning a defendant's silence at time of arrest. The First Circuit, in disagreeing with the Supreme Judicial Court and the United States District Court, has applied the principles enunciated in

Doyle in a very rigid way to a case presenting very different circumstances. It is respectfully submitted that such an approach may well be their prerogative when examining a federal conviction pursuant to their supervisory powers over lower federal courts and federal prosecutors. However, such an approach is not constitutionally mandated. Thus, this case raises serious questions about the scope of habeas corpus.

It is respectfully submitted that the Supreme Judicial Court was correct in "reject[ing] an automatic rule which mandates a mistrial whenever the prosecutor questions a defendant concerning his silence in circumstances where the defendant had no duty to speak." *Commonwealth* v. *Morgan*, *supra*, at 3648 (App. C, *infra*, p. 32a). No basis for such a rule is to be found in *Doyle*, and the Supreme Judicial Court reasonably refused to apply such a rule in the case at bar.

In *Doyle* v. *Ohio*, *supra*, the government's case hinged on the testimony of a "well-known 'street person' with a long criminal record" who was seeking "support in his efforts to receive lenient treatment in his latest legal problems." 426 U.S. at 611. More importantly, the questioning complained of was detailed, explicit and extensive, covering several pages of transcript. 426 U.S. at 613-615. Defense counsel's timely objections were overruled. "In addition, the court . . . permitted the prosecutor, over more objections, to argue petitioners' post-arrest silence to the jury." 426 U.S. at 615, n. 5. Obviously, there were no corrective instructions.

In the case at bar, on the other hand, there was independent evidence that the petitioner had made no statement to the police at the time of his arrest (Tr. 116, 118); there were no objections to the prosecutor's initial questioning on cross-examination dealing with the petitioner's failure

to report the alleged attempted theft to the police (Tr. 217); defense counsel's ultimate objection was sustained (Tr. 217-218); there was a forceful instruction that the prosecutor's question was not proper and that the petitioner "was under no duty to tell the police anything" (Tr. 218); the matter was not brought up during the balance of cross-examination; and the prosecutor never referred to the petitioner's silence at the time of arrest in his closing argument.

To reach the same result in these two situations required an unwarranted extension of *Doyle* by the First Circuit. There is simply no justification to conclude that the case at bar is one of those rare cases in which the jury cannot be trusted to follow a judge's instructions and where a mistrial must be declared. As this Court recently stated in a somewhat different context:

> "There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial." *Arizona* v. *Washington*, ____ U.S. ____, ____, 46 U.S.L.W. 4127, 4132 (February 21, 1978).

The First Circuit noted that "[o]ther circuits, in ruling on the harmlessness of *Doyle* violations, have expressed serious reservations about the efficacy of curative instructions." 569 F.2d at 1167 (App. A, *infra*, p. 12a). However, in two of the four cases (*United States* v. *Johnson*, 558 F.2d 1225, 1230 (5th Cir. 1977), and *United States* v. *Impson*, 531 F.2d 274, 276 (5th Cir. 1976)), there was only an instruction to disregard the question with no indication that the

question was improper and why. In *Reid* v. *Riddle*, 550 F.2d 1003, 1004 (4th Cir. 1977), the court did not discuss the effect of the instructions. Moreover, there, although "the trial judge told the jury that the defendant had a constitutional right at the time of arrest to make no statement, . . . the court refused to grant a requested instruction that the jury could not consider Reid's silence as evidence." But see *United States* v. *Anderson*, 498 F.2d 1038, 1044-1045 (D.C. Cir. 1974).

In neither *United States* v. *Hale*, 422 U.S. 171, 175, n. 3 (1975), affirming *United States* v. *Anderson*, *supra*, nor *Doyle* v. *Ohio*, 426 U.S. 610, 620 (1976), did this Court have occasion to address the efficacy of curative instructions. However, in *Lakeside* v. *Oregon*, ____ U.S. ____, ____, 46 U.S.L.W. 4248, 4250 (March 22, 1978), this Court in a different situation characterized as very doubtful the assumption that "jurors will totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on '[a] speculative assumption . . . so dubious as [this].'" See also *Bruno* v. *United States*, 308 U.S. 287, 294 (1939), where this Court remarked:

> "we have not yet attained that certitude about the human mind which would justify us in . . . a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court . . .."

Perhaps in the final analysis the issue is whether the Court, given the circumstances of Morris Morgan's case, would have upset his conviction if he, instead of Mr. Doyle, had originally raised this issue in 1976. If the answer is yes,

obviously this petition should be denied. However, if the answer is no, then it is respectfully submitted that serious questions are raised as to the appropriate role of the federal courts in reviewing state court convictions.

II. The Rule of Doyle v. Ohio Should Not be Retroactively Applied.

Doyle v. *Ohio*, 424 U.S. 610 (1976), was decided on June 17, 1976, almost two years after the petitioner's state court trial and six months after the decision of the Supreme Judicial Court.

Although the Supreme Judicial Court "accept[ed] the [petitioner's] contention that, standing alone, the questioning amounted to constitutional error" (App. C, *infra*, p. 30a), it did so on the authority of *United States* v. *Hale*, 422 U.S. 171 (1975). However, *Hale* was clearly based on the exercise of this Court's supervisory powers over lower federal courts. 422 U.S. at 181. Prior to *Doyle*, "whether impeachment use of a defendant's post-arrest silence violates any provision of the Constitution" was "a question left open." *Doyle* v. *Ohio*, *supra*, at 616.

This Court has "stress[ed] that the retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson* v. *New Jersey*, 384 U.S. 719, 728 (1966). The same considerations that led this Court to conclude that the rule in *Griffin* v. *California*, 380 U.S. 609 (1965), did not require retrospective application are applicable to the case at bar. See *Tehan* v. *Shott*, 382 U.S. 406 (1966).

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the First Circuit Court of Appeals.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
ROBERT V. GRECO,
Assistant Attorney General,
Criminal Bureau,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

Appendix A.

United States Court of Appeals
For the First Circuit

No. 77-1414

MORRIS MORGAN,
PETITIONER, APPELLANT,
v.
FRANK A. HALL, ETC., ET AL.,
RESPONDENTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

Robert S. Potters for appellant.
Robert V. Greco, Assistant Attorney General, Criminal Division, with whom *Francis X. Bellotti*, Attorney General, and *Stephen R. Delinsky*, Assistant Attorney General, Chief, Criminal Bureau, were on brief, for appellees.

January 26, 1978

CAMPBELL, *Circuit Judge*. This appeal is from the district court's denial of Morgan's habeas corpus petition. When petitioner took the stand at his state criminal trial, the prosecutor asked questions which focused upon his silence after arrest. As these were constitutionally improper, *Doyle* v. *Ohio*, 426 U.S. 610 (1976), we must decide if the prosecutor's error was harmless beyond a reasonable doubt.

Morris Morgan, a 32 year old black, was accused of abducting and raping Barbara Palkey, a 26 year old white,

in the early morning hours of March 24, 1974. Indicted in Massachusetts for assault and battery, commission of a lewd and lascivious act, rape, sodomy and kidnapping, he was tried before a Superior Court jury in September, 1974. The jury found him not guilty of kidnapping and sodomy but guilty on the other counts and he was sentenced to 12 to 15 years in state prison. Upon appeal, the Massachusetts Supreme Judicial Court took direct jurisdiction on its own motion and affirmed the conviction in December, 1975. *Commonwealth* v. *Morgan*, Mass. Adv. Sh. (1975) 3635, *cert. denied*, 427 U.S. 905 (1976). Morgan filed this petition in the district court in August, 1976. The district court declined to issue the writ but issued a certificate of probable cause to permit an appeal.

According to the testimony of the alleged victim, Miss Palkey, she went with a friend on the evening of March 23, 1974 to a large nightclub in the Fenway Park area of Boston. She arrived at the club about 10 p.m. and after an hour decided to leave. She discovered she had lost the check for her coat, and the club refused to return it until all other coats had been picked up. She resigned herself to staying until the 2 a.m. closing time, but her girlfriend ran into a male friend and departed around midnight. During her stay at the club, Palkey drank one coke; she sat at a table with her friend until she left and then stood against the wall, not talking to anyone except to decline offers to dance. At 2 she retrieved her coat and began walking the several blocks to where her car was parked. Outside the club many young people, perhaps as many as a hundred, were milling around. At that point Morgan came up to her and asked if he could walk with her. She indicated it wouldn't be necessary, but he stayed with her. They turned from the still populated main street to a side street where she had parked. Her car was hemmed in by other cars, and they were alone on the street. Morgan asked for a

ride home; intimidated by the situation, she agreed. Apparently she was able to get into her car and lock all the doors, but then unlocked the passenger side to let him in.

She drove through Kenmore Square and down Commonwealth Avenue. Until they reached Exeter Street, Morgan behaved in a mild and friendly manner, but when they turned onto Exeter, he grabbed her by the neck, dug his nails in, and told her to pull over or he would kill her. She offered him her purse, but he said he was going to rape her. They drove around looking for a parking space, passed a disabled motorist in the middle of the street, and eventually settled on a space by a fire plug. He released her neck but kept hold of her arm as they walked to his apartment; he told her he was just out of Walpole and wouldn't hesitate to kill her if she tried to seek help. They passed many people on the street, mostly students leaving parties in the neighborhood.

Palkey went into Morgan's apartment, undressed at his command, and submitted to a variety of sexual acts. According to her testimony, in the course of the next three hours Morgan raped her three times, sodomized her twice, forced her to perform oral sex on him twice, and performed oral sex on her once. According to Palkey Morgan again asserted he recently had been released from Walpole as the result of a legal technicality. By the end of the evening, she was sitting on the edge of the bed crying. Morgan asked her if she was ready for a beating, tapped her lightly on the chin, and then struck her on the jaw. When she arose, her mouth was bleeding and her teeth were awry; her jaw had been broken. Morgan looked stunned and got her a towel to stem the bleeding. He said he would have to take her to a hospital and asked her what she would say; she suggested she would fabricate a story about falling down the stairs. They walked to her car, and she got in. Morgan, standing in the street by her side of

the car, said something she could not make out. She answered softly, and when he leaned over to hear her, she pulled out a can of mace from her purse and sprayed him full in the face. She then drove away, stopping at Kenmore Square to call a neighbor who lived across the street from her parents, where she resided at the time. He told her to go to St. Elizabeth's hospital, where he met her after informing her parents of her plight.

Medical examination revealed a fracture of the jaw in three places and the presence of semen in Palkey's vagina. The gynecologist who examined her could not find any evidence of anal intercourse, and neither she nor the oral surgeon who examined Palkey found any evidence of trauma on Palkey's neck. The oral surgeon testified that the jaw injury was consistent with a blow from a blunt object, such as a fist, but was inconsistent with a fall onto a flat surface, such as a floor, or a blow from a sharp object, such as the edge of a table. The surgeon had treated many injuries caused by fists during his military service. The gynecologist took a sexual history, which indicated that Palkey had been sexually active for eight years, had used an I.U.D. coil for 10 months, and had had sexual intercourse four days previous to her contact with Morgan. Her account of the assault at that time conformed to her later testimony at trial.

A Boston police officer, Detective Rufo, testified that on Monday, the twenty-fifth, he interviewed a young woman in Morgan's apartment. The young woman, who identified herself as a friend of the defendant's, told the detective she had spent Friday and Sunday nights in Morgan's apartment but had not seen him between Saturday afternoon and Sunday evening. Rufo then took 15 pictures to the hospital, from which Palkey identified Morgan's. Rufo went to Morgan's place of employment, gave him *Miranda* warnings, and arrested him. During cross-examination of

Rufo by Morgan's attorney, the following exchange occurred:

XQ. You advised him of his rights?
A. Yes.
XQ. One of his rights was that he had a right to be silent?
A. Yes.
XQ. And he exercised that right?
A. Yes.
XQ. Nothing wrong with that, is there?
Mr. O'Neil: I object.
A. No.
The Court: I'll let it stand.

The detective did not observe any facial injury on Morgan that might have been caused by mace.

Morgan took the stand in his own defense and told a dramatically different story. He claimed to have met Palkey in the nightclub, danced with her once, and then received a proposition of sex for money. He let the offer pass at that time; later in the evening, she encountered him again and they began negotiating a price. After agreeing that she would receive $15, they left together and she drove him to his apartment. They had sexual relations, and Morgan then fell asleep. He denied having sodomized her. He woke up to see Palkey slipping out his door with his television set. He sprang up, grabbed her by the arm and flung her back into his apartment. She tripped over some furniture and her head struck his coffee table. He went over to his bureau, discovered that all his money had been stolen, and demanded its return. He noticed Palkey was injured and helped her try to stop the bleeding. She decided to go to the hospital on her own, and Morgan offered to pay her expenses.

On cross-examination the prosecution attempted to impeach Morgan's credibility. After running through Mor-

gan's version of Palkey's conduct, the prosecution initiated this line of questioning:

XQ. Did you when this was over, did you report this to the police?

A. No.

XQ. Did you make any attempt to communicate this information to the police?

A. No.

XQ. Did you tell Detective Rufo when he came for you?

A. No.

XQ. Did you mention anything about that to him?

A. No.

Mr. Banks: I object.

The Court: Sustained.

XQ. Did you mention to anyone, to any one of the police that you happened to see —

Mr. Banks: I object. May I approach the bench.

The Court: Yes.

At the Bench:

Mr. Banks: Your Honor, May it please the Court, I am going to move for a mistrial — he has three times entered that area after objection.

The Court: What do you say?

Mr. O'Neil: Your Honor, I merely asked that since he is claiming the woman was a prostitute and committing a crime, did he report that to the police.

The Court: I will sustain the objection.

Mr. Banks: Exception.

The Court: I would keep away from that, because it's a very fine line. He was under no obligation to say anything.

Mr. O'Neil: I know that.

In Open Court:

The Court: I should tell the jury that when the defendant was arrested, one of the rights that he has is the right to remain silent.

He is under no obligation to speak to the police.

And, therefore, the question: Did you tell the police this or that — that is really not proper. And I will ask you to exclude it from your mind.

He was under no duty to tell the police anything.

The state also brought out, by way of impeachment, that Morgan had been convicted of heroin possession in 1972. In his instructions, the Superior Court judge informed the jury that Morgan had received a suspended sentence and two years probation for this conviction. Morgan denied ever having been incarcerated in Walpole, and no evidence of such imprisonment was introduced or, apparently, extant.

The right Morgan claims here was not recognized by the Supreme Court as constitutionally required until after Morgan had exhausted state proceedings, but both the trial court and the Supreme Judicial Court assumed that prosecutorial efforts to impeach a defendant through his post-arrest silence were improper, if not unconstitutional. Their assumption was confirmed first by *United States* v. *Hale,* 422 U.S. 171 (1975), and ultimately by *Doyle* v. *Ohio,* 426 U.S. 610 (1976). *Hale,* which came down before the Supreme Judicial Court's decision in this case, and rested on the Supreme Court's supervisory power over federal courts, held that evidence concerning post-arrest silence was inadmissible because of its lack of probative value and inherently prejudicial effect. The Court remarked on the inherent ambiguity of such silence:

"Respondent, for example, had just been given the *Miranda* warnings and was particularly aware of his right to remain silent and the fact that anything he

said could be used against him. Under these circumstances, his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct."

Id. at 177. Furthermore, the fact of silence bore a significant potential for prejudice:

"The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest."

Id. at 180. These factors, and the lurking constitutional implications, led the Court to pronounce a per se rule on the admissibility of such evidence.

The next Term, the Court in *Doyle* broadened *Hale* into a constitutional holding. As in *Hale,* the defendant at trial presented an exculpatory story that he had not mentioned at the time of arrest. During cross-examination the prosecution questioned him about his earlier silence; unlike *Hale,* the court overruled counsel's timely objections. The Supreme Court, relying on something akin to an implied contract theory, ruled that the interrogation violated due process:

"Silence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. *See United States* v. *Hale,* 422 U.S. at 177. Moreover, while it is true that the *Miranda* warnings contain no express

assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."

426 U.S. at 618. The effect of this holding was to apply *Hale* with full force to state criminal trials.

Both *Hale* and *Doyle* suggested, however, that in some instances prosecutorial comment on post-arrest silence, although unconstitutional, might constitute a harmless error under the standard of *Chapman* v. *California,* 386 U.S. 18 (1967). In *Hale* the defense had objected promptly to the questioning and received a careful instruction from the court. The court of appeals nevertheless held the error was not harmless, and the Government did not press the point before the Supreme Court. *Id.* at 175 n.3. In *Doyle* the state did not contend the error was harmless. *Id.* at 619-20. But the Court's recognition of the issue implied the applicability of the principle.

Both the Massachusetts Supreme Judicial Court and the district court treated the prosecutor's conduct in this case as constitutionally improper and we have no reason to doubt that they were right. Although the prosecutor's first two questions, directed merely at the defendant's failure voluntarily to report Palkey's behavior to the police, were not by themselves improper, the last three were all directed at the defendant's silence after apprehension and arrest. Previous testimony had established that Morgan had no contact with Detective Rufo until Rufo came to put him under arrest; there was no time during that encounter when Morgan could have protested his innocence before his arrest. Furthermore, however innocent-appearing the first two questions, they seem designed only to set the stage for interrogation about Morgan's post-arrest silence.

There was little reason, even under Morgan's story, to expect him to have reported Palkey to the police: he had thwarted her attempted robbery, and any complaint about her prostitution would have been self-incriminating. The prosecutor, indeed, conceded to the court he knew that Morgan was under no obligation to say anything, yet continued to pursue the matter after one objection by defense counsel was sustained. We can only assume that notwithstanding the obvious sensitivity of the subject, he was determined to score points with the jury at whatever cost.

We must therefore decide whether, as found by the Supreme Judicial Court, the prosecutor's unconstitutional conduct was harmless beyond a reasonable doubt. *See Chapman* v. *California,* 386 U.S. 18, 24 (1967). Those cases following *Chapman* indicate that a reviewing court must assess the record as a whole to determine the probable impact of the improper evidence on the jury. *See Schneble* v. *Florida,* 405 U.S. 427, 430 (1972); *Harrington* v. *California,* 395 U.S. 250, 254 (1969). The prejudicial effect of the improper conduct must be weighed against the weight of the properly admitted evidence. *Schneble* v. *Florida, supra.*

Both the Supreme Judicial Court and the district court postulated that the evidence of guilt in this case was far from overwhelming, at least as far as the rape charge was concerned.[1] The two accounts of the evening in question directly contradicted each other, and particular portions of Palkey's story, especially her presence at the nightclub and apparent willingness to give Morgan a ride home, tended to buttress Morgan's defense of consent. Other Por-

[1] The Supreme Judicial Court observed, "In the present case, there was a sharp conflict between the testimony of the victim and that of the defendant. Thus the record does not provide, as it has in some other cases, clear overwhelming evidence of guilt." Mass. Adv. Sh. (1975) at 3648.

tions of Palkey's testimony might seem questionable to a jury, such as her claim of seven different sexual acts by Morgan in the course of little more than three hours. The medical evidence, although supporting her account of how her jaw was broken, did not substantiate either the claim of sodomy or Palkey's version of how she was forced into Morgan's apartment. The jury's acquittal of Morgan on the kidnapping and sodomy charges suggests the jury had at least some doubts about Palkey's testimony.

Nonetheless, the Supreme Judicial Court was of the opinion that the error was harmless beyond a reasonable doubt "because of the trivial or inconsequential nature of the entire incident." Mass. Adv. Sh. (1975) at 3648. The court also referred to the curative effect of the trial judge's instructions to the jury immediately after the incident. The district court was not as sure about the insignificance of the incident, but ruled that it was bound to regard the improper questioning as harmless here because prior precedent in this circuit indicated a prompt and forceful instruction by the trial judge could cure the error. We turn first to the question of the effect of the instruction in ameliorating the harm caused by this episode.

Although the actions of the presiding judge were commendable as well as perceptive in light of the undeveloped state of the law at that time, we are unable to conclude that his efforts were sufficient to purge the prejudicial questioning. The cases in this circuit on which the Supreme Judicial Court and the district court relied all involved prosecutorial comment on the failure of the defendant to take the stand. *See e.g., United States* v. *Flannery,* 451 F.2d 880 (1st Cir. 1971). In such cases, this court has declared:

> "If the court interrupts the argument, instructs the jury fully on the defendant's constitutional right not to testify and the jury's obligation not to draw un-

favorable inferences and, in addition, states to the jury that the U.S. Attorney was guilty of misconduct, we may find no prejudice . . . ."

Id. at 882. The situation where a defendant does not take the stand, however, is distinguishable from a failure to mention an exculpatory story upon arrest. As this court has recognized, the defendant's failure to testify in his own behalf ordinarily will be apparent to the jury, and comment directed to that fact to some extent only accentuates the obvious. *See Goitia* v. *United States,* 409 F.2d 524, 528 (1st Cir. 1969), *cert. denied,* 397 U.S. 906 (1970). Here, by contrast, the fact that a defendant did not tell his story when first confronted by the police is not so obvious. Even when the fact of silence upon arrest is brought out, further development is needed to tie this silence to the subsequently raised exculpatory story.

In the one case since *Doyle* where this circuit has held improper comment on post-arrest silence to be harmless error, the state trial court instructed the jury much as was done here. *Booton* v. *Hanauer,* 541 F.2d 296, 299 (1st Cir. 1976). We emphasized, however, that the improper testimony was not calculated to damage a point upon which a defense was being constructed. *Id.* The opposite is true in this case.

Other circuits, in ruling on the harmlessness of *Doyle* violations, have expressed serious reservations about the efficacy of curative instructions. *See United States* v. *Johnson,* 558 F.2d 1225 (5th Cir. 1977); *Reid* v. *Riddle,* 550 F.2d 1003 (4th Cir. 1977); *United States* v. *Impson,* 531 F.2d 274 (5th Cir. 1976); *United States* v. *Anderson,* 498 F.2d 1038, 1045 (D.C. Cir. 1974) (quoting *Stewart* v. *United States,* 366 U.S. 1, 10 (1961)), *aff'd sub nom. United States* v. *Hale,* 422 U.S. 171 (1975).[2] Those cases that have held

[2] The state seems to imply in its brief that decisions applying and interpreting *Hale* are not relevant to this case, as *Hale* involved only federal prosecutions. Although it is true that *Doyle* and *Hale* rested on different sources of judicial power, the rule announced by the later case was identical to that formulated in *Hale*. Thus those decisions grappling with the harmlessness of *Hale* violations apply at least by way of strong analogy to cases grounded on *Doyle*.

such errors to be harmless have emphasized not the presence or absence of curative instructions but the overwhelming evidence of guilt. *See Moore* v. *Cowan,* 560 F.2d 1298 (6th Cir. 1977); *Stone* v. *Estelle,* 556 F.2d 1242 (5th Cir. 1977); *United States* v. *Davis,* 546 F.2d 583 (5th Cir.), *cert. denied,* 431 U.S. 906 (1977); *United States* v. *Wycoff,* 545 F.2d 679 (9th Cir. 1976), *cert. denied,* 429 U.S. 1105 (1977); *Meeks* v. *Havener,* 545 F.2d 9 (6th Cir. 1976), *cert. denied,* — U.S. — (1977); *Jones* v. *Wyrick,* 542 F.2d 1013 (8th Cir. 1976), *cert. denied,* 430 U.S. 956 (1977). In several cases the error was held harmless because the defendant did not present an exculpatory story that his silence would impeach. *United States* v. *Sklaroff,* 552 F.2d 1156 (5th Cir. 1977); *Chapman* v. *United States,* 547 F.2d 1240 (5th Cir.), *cert. denied,* 431 U.S. 908 (1977); *Booton* v. *Hanauer, supra.* In no case has a prompt and forceful instruction alone been held sufficient to vitiate the use of post-arrest silence.

Although the instruction alone did not rid the prosecutor's error of harmful impact, we must also consider whether, in light of all the circumstances, the incident was so insignificant as to be harmless beyond a reasonable doubt. The Supreme Judicial Court stressed "that the cross-examination did not deal directly with the subject of the defendant's guilt but with the collateral question, still important to be sure, of his credibility." Mass. Adv. Sh. at 3645. In the circumstances of this case, however, the questions of guilt and credibility were inextricably bound together. Morgan's story, if it were to be believed, would have established the fact of consent and thereby disproved an essential element of the crime of rape.

In this appeal, the state does not press the distinction between credibility and guilt, but rather emphasizes that Morgan's attorney had brought out the fact that his client had remained silent when arrested through his cross-examination of Detective Rufo. It contends that this earlier exchange vitiated whatever prejudice resulted from the prosecutor's questioning. The question is a close one, but we find it hard to say the linkage between this silence and an attack on Morgan's credibility, the product of the prosecution's conduct, was harmless beyond a reasonable doubt. Defense counsel only exposed the fact of silence; the prosecution tried to use this silence to undermine Morgan's story, exactly the kind of behavior prohibited by *Hale* and *Doyle*. The district court thought "the evidence in [the earlier] context was not as prejudicial as its subsequent use to impeach the defendant's credibility."

In one case posing a similar problem, the Ninth Circuit held that the prosecution's reference to the withholding of certain documents by the defendant to undermine defense arguments was harmless error, where the defendant himself had volunteered the fact during cross-examination. *United States* v. *Helina*, 549 F.2d 713 (9th Cir. 1977). However, the court believed defendant had failed to object to the prosecutor's comments and expressed reservations about the applicability of the constitutional privilege to documents. A strong dissent argued that defendant had properly preserved his objection, that *Doyle* clearly applied, and that the error could not be deemed harmless. *Id.* at 721-22 (Ely, J., dissenting).

In this case the behavior of the prosecution fell exactly into that category of conduct that the Supreme Court prohibited in *Hale* and *Doyle*. Furthermore, the defense promptly moved for a mistrial and preserved its objection to the decision to go on with the trial. Consequently, it would be difficult to hold the misconduct harmless. The writ must therefore issue.

A final point involves the applicability to this case of the doctrine announced in *Stone* v. *Powell*, 428 U.S. 465 (1976). Although the issue was not raised by either party, the question is jurisdictional and therefore can be raised at any time and on the court's own motion. Although at least one federal court has held a petition for habeas corpus grounded on a *Doyle* violation to be barred by *Stone*, *see Moore* v. *Cowan*, *supra*, 560 F.2d at 1301, we decline to do likewise. The Supreme Court held in *Hale* that the probative value of post-arrest silence, if any, is far outweighed by its prejudicial effect; if so, we can hardly say that this silence is the kind of reliable evidence bearing on the guilt or innocence of the petitioner, the excludability of which might be precluded from habeas review after *Stone*. *See id.* at 490.

The writ of habeas corpus shall issue unless within 90 days from the date of this opinion the Commonwealth has either instituted proceedings to retry the petitioner or applied for a writ of certiorari. If certiorari is sought and granted, the issuance of the writ of habeas corpus shall be stayed pending further order of the Supreme Court. If certiorari is sought and denied, the writ of habeas corpus shall issue unless the Commonwealth has instituted proceedings to retry the petitioner within 30 days after the date of certiorari is denied.

So ordered.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MORRIS MORGAN,
PETITIONER,

v.

FRANK A. HALL,
Commissioner of Corrections,
Commonwealth of Massachusetts
AND
LARRY MEACHUM,
Superintendent, Massachusetts
Correctional Institution, Norfolk,
RESPONDENTS.

CIVIL ACTION
No. 76-2930-S

Memorandum and Order

July 15, 1977

SKINNER, D.J.

This petition for habeas corpus arises out of the petitioner's conviction in the state court for rape and committing unnatural acts.

The complainant testified at the trial in the Superior Court that she had been at a nightclub on Landsdowne Street in Boston. As she left, she said that she was followed to her car by the petitioner, who demanded a ride home. She claimed that she was afraid of him, because the streets were deserted. She let him in the car and drove him to his

apartment. While in the car, he grabbed her by the neck, sticking his fingernails into her neck, demanded that she accompany him and told her that he was going to rape her. In the apartment he had repeated sexual intercourse with her, including anal sex and fellatio. There were a total of seven sexual acts forced upon her by the petitioner during approximately four hours. At the end of this period, the petitioner hit the complainant on the jaw, breaking it and dislodging several of her teeth. He then attempted to take her to a hospital. When they reached her car, the victim took a can of Mace from her car, sprayed the petitioner and drove away.

The government introduced evidence through two doctors of physical examinations of the complainant. A gynecologist testified that she examined the complainant shortly after these events and found evidence of recent sexual intercourse, but no signs of anal intercourse or trauma to the anus, and no signs of trauma or marks of any kind on the neck. An oral surgeon testified that he examined her jaw and gave his opinion that the injury was consistent with a blow from a blunt object such as a fist and not likely to have been caused by falling on a table. He did not rule out that possibility.

The petitioner testified that he had met the complainant at the nightclub, that they had danced together several times, that he had bought her a drink, that she had expressed admiration for his appearance, that she had then offered to have sexual intercourse with him for fifteen dollars, and that after some reflection he accepted the offer. According to him they went to his apartment where they did have intercourse as agreed. He then slept. When he awoke in the morning he observed the complainant leaving the apartment with his portable television set. He caught her and flung her back in the room, as a result of which

she fell over a chair and hit the table. He checked his bureau drawer and found money missing. He demanded that she return the money, which she did. He then observed that her jaw was bleeding. They both tried to stop the bleeding. The complainant then said that she would prefer to go to a hospital by herself, and she left in her car.

There was further testimony of the complainant's complaint to the police and the subsequent arrest of the petitioner. At the time of his arrest he was advised of his "Miranda" rights, including the right to remain silent. He made no statement to the police.

During the cross-examination of the petitioner by the Assistant District Attorney, the following exchange occurred, as it appears on pp. 217-218 of the transcript.

Q Did you make any attempt to communicate this information to the police?

A No.

Q Did you tell Detective Rufo when he came for you?

A No.

Q Did you mention anything about that to him?

A No.

MR. BANKS: I object.

THE COURT: Sustained.

Q Did you mention to anyone, to any one of the police that you happened to see —

MR. BANKS: I object.

May I approach the bench.

THE COURT: Yes.

At the Bench:

MR. BANKS: Your Honor, may it please the Court, I am going to move for a mistrial — he has three times entered that area after objection.

THE COURT: What do you say?

MR. O'NEIL: Your Honor, I merely asked that since he is claiming the woman was a prostitute and committing a crime, did he report that to the police.

THE COURT: I will sustain the objection.

MR. BANKS: Exception.

Exception 8-A

THE COURT: I would keep away from that, because it's a very fine line. He was under no obligation to say anything.

MR. O'NEIL: I know that.

In open Court:

THE COURT: I should tell the jury that when the defendant was arrested, one of the rights that he has is the right to remain silent.

He is under no obligation to speak to the police.

And, therefore, the question: Did you tell the police this or that — that is really not proper. And I will ask you to exclude it from your mind.

He was under no duty to tell the police anything.

The information referred to related to the alleged attempted theft of the television and money by the complainant.

The petitioner alleges as his principal ground for the issuance of the writ that the failure of the court to declare a mistrial violated his constitutional rights. The issue was raised on appeal to the Supreme Judicial Court, which held in view of the isolated character of the incident and the judge's prompt instructions, that the error was harmless and affirmed the conviction.

The Supreme Judicial Court accurately predicted the subsequent holding of the Supreme Court of the United States in *Doyle v. Ohio*, 426 U.S. 610, 619 (1976):

We hold that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment.

The question of harmless error is more difficult. The court must be satisfied beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18 (1967). It is true that the interrogation was brief, isolated and not the subject of further comment by the prosecution. On the other hand, the government's evidence was far from overwhelming. The complainant's account of her presence at the nightclub was not impressive, and the medical evidence failed to corroborate her account of repeated anal intercourse and of the petitioner having dug his fingernails into her neck. While I can not say that the complainant's account of the petitioner's sexual energy is inherently incredible, it certainly merits critical evaluation. The case thus turned on the credibility of the complainant versus the credibility of the petitioner. Constitutionally improper questions designed effectively to impeach the petitioner's credibility could not be considered harmless beyond a reasonable doubt under these circumstances unless the harm was neutralized by the trial judge's instructions. Even though the jury had the information already, through the testimony of the police officer that petitioner had made no statement at the time of his arrest, no objection to this evidence was taken at the trial, and no claim of error asserted either before the Supreme Judicial Court or in this proceeding, the evidence in that context was not as prejudicial as its subsequent use to impeach the defendant's credibility.

The case rests ultimately on the effect to be given the curative instruction. There is a line of cases which holds

that such an instruction exacerbates the error. *United States v. Anderson*, 498 F.2d 1038 (D.C. Cir. 1974), *aff'd sub nom. United States v. Hale*, 422 U.S. 171 (1975) (this point was not before the Supreme Court). Other circuits have held the curative instruction ineffective; *e.g.*, *United States v. Impson*, 531 F.2d 274 (5th Cir. 1976).

Comparison of *Rodriguez-Sandoval v. United States*, 409 F.2d 529 (1st Cir. 1969), with *Goitia v. United States*, 409 F.2d 524 (1st Cir. 1969), suggests that our Court of Appeals holds that a prompt and forceful instruction will neutralize even errors of constitutional proportion. *See United States v. Flannery*, 451 F.2d 880, 882 (1st Cir. 1971). I agree with the Supreme Judicial Court that the trial judge's instruction meets the standards of *United States v. Flannery*, *supra*.

I conclude therefore that while there was a clear violation of the petitioner's rights which was not harmless error, it was, under the First Circuit rule, effectively neutralized by the trial court's prompt instruction to the jury.

The petitioner further asserts a violation of his constitutional rights by reason of the utilization by the trial court of M.G.L., c.234 §1A, which permits the trial judge to excuse a woman juror who states that she is likely to be embarrassed by the evidence of certain sex-related crimes. One such juror was so excused. The discussion of this point by the Supreme Judicial Court was complete and correct, and I see no need to repeat or paraphrase it. *Cf. Taylor v. Louisiana*, 419 U.S. 522 (1975).

Accordingly, the petition is DISMISSED on the merits.

WALTER JAY SKINNER,
United States District Judge.

Appendix C.

SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* MORRIS MORGAN.

Suffolk. October 6, 1975. — December 23, 1975.

Present: TAURO, C.J., REARDON, QUIRICO, BRAUCHER, & WILKINS, JJ.

Jury and Jurors. Practice, Criminal, Empanelling of jury, Fair trial, Mistrial. *Error,* Whether error harmful. *Evidence,* Impeachment of witness.

THREE INDICTMENTS found and returned in the Superior Court on May 8, 1974. The cases were tried before *Cross,* J. After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Robet S. Potters for the defendant.

Timothy P. O'Neill, Assistant District Attorney, for the Commonwealth.

WILKINS, J The defendant, who was convicted of rape, engaging in an unnatural and lascivious act, and assault and battery, argues four assignments of error. The circumstances relating to each assignment are set forth as we deal with it. There was no error.

1. The defendant's first contention is that he was denied his constitutional right to a fair trial and to equal protection of the laws because the trial judge excused a woman juror pursuant to G. L. c. 234, § 1A. Over the defendant's objection and exception, the judge advised each potential woman juror that she could be excused if she would be embarrassed by hearing the testimony or discussing it in the jury room. One woman chose to be excluded; one woman did not.

The judge believed that he was obliged to bring to the attention of women jurors their option of withdrawing if they would be embarrassed to serve. Section 1A of G. L. c. 234, inserted by St. 1949, c. 347, § 2, provides in part that "[n]o woman shall be required to serve in the trial of any prosecutions . . . [of certain sex crimes and obscenity cases] if, upon her representation it appears to the presiding justice that she would be likely to be embarrassed by hearing the testimony or by discussing the same in the jury room."

The defendant argues that the exclusion of one woman juror because the judge concluded that she might be embarrassed denied him his constitutional right to a jury drawn from a fair cross section of the community. He argues further that he was denied equal protection of the laws because the persons who constituted the jury were not selected in the same manner as they would have been for a defendant who was not charged with a sex crime.[1]

The defendant was not denied his constitutional right to a jury drawn from a fair cross section of the community because one woman was excused from the jury pursuant to the provisions of § 1A. Section 1A does not provide for an automatic exemption for all women, as was the case in

---

[1]The transcript contains no discussion between the judge and the women who asked to be excused. It does have the judge's reference to the subject of the statute made "to the ladies on the jury" and a conference at the bench with the woman who elected to serve. The defendant does not object to the judge's interpretation of the statute or his treatment of the subject except on constitutional grounds. Therefore, this case is unlike *Commonwealth* v. *McKay,* 363 Mass. 221 (1973) (Mass. Adv. Sh. [1973] 373), where no constitutional challenge was raised to the dismissal of a potential woman juror but the judge's treatment of the subject was claimed to be an abuse of discretion.

The judge's references to the statute as one "passed a long time ago" and as an "old statute" suggest that he did not intend to encourage women to withdraw as jurors.

Taylor v. *Louisiana*, 419 U.S. 522 (1975). Indeed, the opinion in the *Taylor* case recognizes that States "remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." *Id.* at 538.[2]

Reasonable individual exemptions, which do not result in significant underrepresentation of a class in the group from which petit juries are chosen, are recognized as acceptable in the *Taylor* case. *Id.* at 534, 538. We believe that the exclusion of a woman pursuant to the provisions of § 1A is such a reasonable exemption. Not only does the exemption not apply to all women, but also it applies only when a woman represents that she would be likely to be embarrassed by hearing the evidence or discussing it and the judge determines that her representation is correct. Embarrassed women do not constitute a significant class in society whose exclusion from jury service raises a constitutional question. Cf. *Commonwealth* v. *McKay*, 363 Mass. 221, 224 (1973) [Mass. Adv. Sh. (1973) 373, 375]. Because the operation of § 1A does not exclude a class of persons, it does not deny a defendant a jury made up of a fair cross section of the community. For similar considerations, not involving any

[2]The *Taylor* case involved the makeup of the venire. Section 1A does not concern the makeup of the venire, but applies to a woman who has been selected from the venire to serve on a particular jury. For the purposes of the constitutional analysis involved here, we accept the defendant's argument that the two situations are the same. However, there is no requirement that the petit jury, as opposed to the pool from which it is selected, "mirror the community and reflect the various distinctive groups in the population." *Taylor* v. *Louisiana*, *supra* at 538.

The present case was tried before the decision in *Taylor* v. *Louisiana*, *supra*. The defendant recognizes that the principle of the *Taylor* case is not retroactive (*Daniel* v. *Louisiana*, 420 U.S. 31 [1975]), but argues that our decisions have long recognized a similar principle in this Commonwealth.

constitutional question, compare *Searle* v. *Roman Catholic Bishop of Springfield*, 203 Mass. 493 (1909) (where persons excluded from the petit jury constituted an identifiable class), with *Commonwealth* v. *Gilday*, ____ Mass. ____, ____ (1975) [Mass. Adv. Sh. (1975) 1135, 1167], and *Commonwealth* v. *McKay*, 363 Mass. 221, 224 (1973) [Mass. Adv. Sh. (1973) 373, 375] (where persons so excluded were not members of an identifiable class). We add that the defendant has not shown, as he must, that he sustained any prejudice by the application of § 1A in his case. See *Brunson* v. *Commonwealth*, ____ Mass. ____ (1975) [Mass. Adv. Sh. (1975) 3292].

Because the operation of § 1A does not infringe on the defendant's constitutional right to a fair trial, we do not have to reach the question whether § 1A might be sustained because the Commonwealth has a valid ground for impinging on the defendant's constitutional right.[3] We note that, if the defendant's argument were to prevail as to all sex-related crimes, a criminal defendant would have a constitutional right, for example, to compel a nonconsenting and objecting person to view an obscene motion picture. We doubt that the Federal Constitution says that a defendant

[3]Persons who are incapable of performing the tasks of jurors fairly and well have to be excluded from any jury service. See 28 U.S.C. § 1865(b) (1970), as amended, 28 U.S.C. § 1865(b) (Supp. II, 1972), which requires that a juror have a minimum ability to speak, read, write, and understand English and have no mental or physical infirmity. It could be argued that a person who would be so squeamish about the subject matter of any alleged sex crime as to want to withdraw from the jury has a disability different only in degree from the disability of a person who cannot understand or speak the English language. Indeed, analyzed from the viewpoint of a defendant charged with sex crimes, but acknowledging his constitutional right to argue the point (*Taylor* v. *Louisiana*, *supra* at 526), it is difficult to imagine that service by a squeamish juror would enhance such a defendant's chances of a favorable verdict.

would be denied a jury drawn from a fair cross section of the community unless such a juror is forced to serve. Certainly the Supreme Court of the United States has not yet said that it does, and we are confident that the Constitution of the Commonwealth does not.

We come then to the defendant's claim that he was denied equal protection of the laws because he was tried by a jury of a different composition than would have tried a defendant not charged with a sex-related crime. We have no difficulty in accepting a statutory pattern which provides a mechanism for exemption of a juror, who would be embarrassed, only where the trial involves a sex-related crime. Such a classification is decidedly rational. The evidence in sex-related criminal prosecutions obviously is more apt to be the source of embarrassment than the evidence in prosecutions not relating to sexual conduct.

Although the defendant expresses his argument under a heading of discrimination between defendants, his major contention is voiced in opposition to the statutory distinction between men and women. He argues that there is no rational basis to assume women are more apt to be embarrassed by hearing sex-related cases than men. He adds that, even if women are more apt to be embarrassed, there is no compelling State interest which can justify the discrimination in the face of an equal protection challenge. It is far from clear that the defendant may raise this objection to the sex-based discrimination appearing in § 1A. He is not objecting that embarrassed men may have been allowed to serve as jurors. He claims rather that no embarrassed woman should have been excused. But the more rational cure for any constitutionally unacceptable sex-based discrimination in § 1A might be found in extending its provisions to men rather than denying them to women (see authorities cited in *House* v. *House*, ____ Mass. ____, ____-

____ [1975]) [Mass. Adv. Sh. (1975) 1964, 1968-1969], and the defendant did not make such a request of the judge.

In any event, the defendant has not been discriminated against in violation of his right to equal protection of the laws. As we have said, the defendant was not denied a jury drawn from a representative venire and is situated rationally in a class different from criminal defendants not charged with sex-related crimes. Section 1A, with its expressed sex-based distinction or without it, applies equally to all persons in the defendant's classification. Thus he is not entitled to a "strict scrutiny-compelling state interest" equal protection analysis. See *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971).[4]

In the future, when the question of a juror's embarrassment is involved under § 1A, we suggest that the judge question the prospective juror in the absence of the jury and make a statement of the findings or other basis for his decision to excuse or not to excuse the prospective juror.

2. The defendant's second contention is that he was prejudiced because the prosecutor cross-examined him con-

[4]Section 1A is not without its minor classification problems, although none is of such a character that the defendant may derive any benefit from it. See *Amado* v. *Superintendent, Mass. Correctional Institution at Walpole*, Mass. , (1974) (Mass. Adv. Sh. [1974] 1219, 1224). It is operative as to some crimes where juror embarrassment may be minimal or nonexistent. See, e.g., G. L. c. 272, § 15 (polygamy); G. L. c. 272, § 22 (concealing the death of an illegitimate child); G. L. c. 272, § 33 (exhibiting an albino person or certain deformed or apparently deformed persons for hire). On the other hand, § 1A does not apply (except by implication) to two sex-related crimes created since its enactment: (1) the crime of assault to commit rape on a female child under the age of sixteen (G. L. c. 265, § 24B, inserted by St. 1955, c. 763 § 3) and (2) the crime of committing an unnatural and lascivious act with a child under the age of sixteen (G. L. c. 272, § 35A, inserted by St. 1955, c. 763, § 4).

cerning his failure to make a particular statement to the police at a time when he was under arrest and thus had no duty to speak. We think that any prejudice was insubstantial and was rendered harmless beyond any reasonable doubt by the judge's prompt instruction to the jury. Thus the judge's denial of the defendant's motion for a mistrial was correct.

The problem arose in this way. On direct examination, the defendant testified that the complainant tried to steal his television set from his apartment where the alleged crimes occurred and that he woke up and stopped her. On cross-examination, twice without objection, the prosecutor asked the defendant whether he had reported the attempted theft to the police. He said, "No." The prosecutor then pressed the point, asking whether the defendant had told the arresting police officer of the attempted theft. An analysis of the prosecutor's questioning, of the defendant's objections, and of the judge's immediate instruction to the jury, which are set forth in the margin,[5] shows a prompt

[5]THE PROSECUTOR: "Did you when this was over, did you report this to the police?"

THE DEFENDANT: "No."

THE PROSECUTOR: "Did you make any attempt to communicate this information to the police?"

THE DEFENDANT: "No."

THE PROSECUTOR: "Did you tell Detective Rufo when he came for you?"

THE DEFENDANT: "No."

THE PROSECUTOR: "Did you mention anything about that to him?"

THE DEFENDANT: "No."

COUNSEL FOR THE DEFENDANT: "I object."

THE JUDGE: "Sustained."

THE PROSECUTOR: "Did you mention to anyone, to any one of the police that you happened to see —"

COUNSEL FOR THE DEFENDANT: "I object. May I approach the bench."

THE JUDGE: "Yes."

At the bench: COUNSEL FOR THE DEFENDANT: "Your Honor, may it please the Court, I am going to move for a mistrial — he has three times entered that area after objection."

reprimand and a clear explanation of why the line of questioning was not proper, as applied to a time when the defendant was under arrest.[6] The defendant neither objected to the instruction nor requested additional instructions.

Cases of this character require a consideration of the possibility of continuing prejudice in light of the apparent force and effect of the judge's response. See *Commonwealth* v. *Eagan*, 357 Mass. 585, 592 (1970) (curative instructions concerning police testimony that the defendant chose to remain silent on questioning by the police); *Commonwealth* v. *Domanski*, 332 Mass. 66, 69 (1954) (curative instructions following prosecutorial argument concerning the defendant's failure to take the stand). In weighing any prejudice, we note that the cross-examination did not deal directly with the subject of the defendant's guilt but with the collateral question, still important to be sure, of his credibility. The record does not support the

THE JUDGE: "What do you say?"

THE PROSECUTOR: "Your Honor, I merely asked that since he is claiming the woman was a prostitute and committing a crime, did he report that to the police."

THE JUDGE: "I will sustain the objection."

COUNSEL FOR THE DEFENDANT: "Exception."

THE JUDGE: "I would keep away from that, because it's a very fine line. He was under no obligation to say anything."

THE PROSECUTOR: "I know that."

In open court: THE JUDGE: "I should tell the jury that when the defendant was arrested, one of his rights that he has is the right to remain silent. He is under no obligation to speak to the police. And, therefore, the question: Did you tell the police this or that — that is really not proper. And I will ask you to exclude if from your mind. He was under no duty to tell the police anything."

[6]Although the defendant argues that the prosecutor's questioning dealt as well with the defendant's failure to tell the arresting officer that the complainant consented to the various acts, we do not so interpret the questioning.

defendant's claim that the prosecutor engaged in repeated questioning over repeated, valid objections, sustained by the judge, or that the prosecutor intentionally infringed the defendant's constitutional rights.

Cases in the Federal Courts also have involved a weighing of the alleged harm in light of all the circumstances. For purposes of our weighing of the alleged harm in this case, we start by accepting the defendant's contention that, standing alone, the questioning amounted to constitutional error. See *United States* v. *Anderson*, 498 F.2d 1038 (D.C. Cir. 1974), aff'd on other grounds sub nom. *United States* v. *Hale*, 422 U.S. 171 (1975), which is discussed subsequently in this opinion. See also, however, *United States* v. *Fairchild*, 505 F.2d 1378, 1382 (5th Cir. 1975), which indicates that a defendant's custodial silence may be used to impeach him in certain circumstances. One factor in the weighing process is "the psychological advantage of immediate correction" by the judge's instructions. *Holden* v. *United States*, 388 F.2d 240, 242 (1st Cir.), cert. denied, 393 U.S. 864 (1968). Another factor is that the error was "addressed to credibility rather than substance." *Haberstroh* v. *Montanye*, 493 F.2d 483, 485 (2d Cir. 1974). Both of those mitigating elements are present here.

Assuming constitutional error in the questioning, the issue is whether the error was harmless beyond any reasonable doubt "on our own reading of the record and on what seems to us to have been the probable impact of . . . [the improper questioning] on the minds of an average jury." *Harrington* v. *California*, 395 U. S. 250, 254 (1969). The insignificance of an error can justify a conclusion that the error was harmless beyond a reasonable doubt. See *Schneble* v. *Florida*, 405 U.S. 427, 430-431 (1972). See also *United States* v. *Celcer*, 500 F.2d 345, 347 (5th Cir. 1974), cert. denied, 421 U.S. 911 (1975); *United States* v. *King*, 485 F.2d 353, 360 (10th Cir. 1973); *United States* v. *Noah*, 475 F.2d 688, 696 (9th Cir.), cert. denied sub nom. *Ross* v. *United States*, 414 U.S. 821, and cert. denied, 414 U.S. 1095 (1973); *United States* v. *Goodwin*, 470 F.2d 893, 900 (5th Cir. 1972), cert. denied, 411 U.S. 969 (1973); *United States* v. *Tillman*, 470 F.2d 142, 144 (3d Cir. 1972), cert. denied sub nom. *McCants* v. *United States*, 410 U.S. 968 (1973).

In some similar cases, prompt, curative instructions by the judge are coupled with overwhelming evidence of the defendant's guilt. See, e.g., *United States* v. *Bryant*, 490 F.2d 1372, 1379 (5th Cir.), cert. denied sub nom. *Impson* v. *United States*, 419 U.S. 832 (1974). The majority in *United States* v. *Anderson, supra*, concluded that the error was not harmless beyond a reasonable doubt because the evidence against the defendant was not overwhelming. In the present case, there was a sharp conflict between the testimony of the victim and that of the defendant. Thus the record does not provide, as it has in some other cases, clear, overwhelming evidence of guilt. On the other hand, we believe that harmlessness beyond a reasonable doubt may exist because of the trivial or inconsequential nature of the entire incident. This was the view of the dissenting judge (and of four of the judges on the request for a rehearing en banc) in *United States* v. *Anderson, supra* at 1054.

From our reading of the transcript, we conclude that the defendant was not prejudiced by questioning which indicated that he had not mentioned to the police the victim's attempted or actual criminal conduct. The judge promptly advised the jurors that persons under arrest do not have to say anything and said the questioning was not proper. We believe that the minds of an average jury would not be affected adversely toward a defendant. Indeed, the

average juror might well have been influenced favorably toward the defendant because of the judge's chastisement of the prosecution's overreaching.

At this time, we reject an automatic rule which mandates a mistrial whenever the prosecutor questions a defendant concerning his silence in circumstances where the defendant had no duty to speak. We believe that prompt, forceful, critical instructions, such as were given here, can obviate any prejudice and eliminate any constitutional basis for a claim that a defendant was entitled to a mistrial. In our opinion, the judge's response here was sufficient to protect the defendant's constitutional rights, and his decision not to grant a mistrial was not an abuse of discretion. Cf. *Commonwealth* v. *Paradiso*, ____ Mass. ____, ____, ____-____ (1975) [Mass. Adv. Sh. (1975) 2099, 2107, 2111-2112].

The defendant argues that the judge failed to comply with the requirements laid down in *United States* v. *Flannery*, 451 F.2d 880, 882 (1st Cir. 1971), which adopted a rule that a prosecutor's uncorrected comment on a defendant's failure to contradict certain evidence was reversible error, if that contradiction could come only through testimony from the defendant.[7] We regard the First Circuit Court of Appeals rule as a supervisory, rather than as a constitutionally mandated, one. See *United States* v. *Medina*, 455 F.2d 209, 211 (1st Cir. 1971). It is not necessarily applicable to prosecutorial questioning when the defendant's right to interrupt by objection is expected to be exercised to protect his rights more freely than during the

[7]The First Circuit said (at 882): "If the court interrupts the argument, instructs the jury fully on the defendant's constitutional right not to testify and the jury's obligation not to draw unfavorable inferences and, in addition, states to the jury that the U. S. Attorney was guilty of misconduct, we may find no prejudice; otherwise we will reverse."

prosecutor's closing argument. And, finally, we view the judge's instructions in these different circumstances as complying substantially with the rule laid down in the *Flannery* case.[8]

The defendant also relies on *United States* v. *Hale*, 422 U.S. 171 (1975), in which the Supreme Court exercised its supervisory authority over lower Federal courts to grant a new trial in circumstances which were somewhat similar to those here.[9] The *Hale* opinion does not discuss the question of harmless error. The reasoning of that opinion gives no weight to the fact that the trial judge undertook to give curative instructions to the jury and indeed treats his action as if he had permitted the line of cross-examination. *Id.* at 181. A sharply divided Circuit Court of Appeals had concluded that the prosecutor's questioning was not permitted constitutionally and that the error was not harmless beyond a reasonable doubt. *United States* v. *Anderson*, 498 F.2d 1038 (D.C. Cir. 1974) (two to one decision) (rehearing en banc denied, five to four),[10] aff'd on other grounds sub nom. *United States* v. *Hale*, 422 U.S. 171

[8]A judicial responsibility to interrupt an improper closing argument may be appropriate, whereas a sua sponte interruption of a possibly improper, but unchallenged, line of questioning may not be appropriate and possibly might be harmful to a defendant whose counsel may know that the forthcoming answer will be beneficial to his client's cause. Closing argument of the character made by the prosecution in the *Flannery* case never can have a beneficial effect on the defendant's case, and, therefore, judicial interruption fairly may be mandated.

[9]In the *Hale* case, the cross-examination concerned the defendant's failure to offer an exculpatory explanation while in police custody. Here the cross-examination concerned the defendant's failure to accuse the prosecution's principal witness of attempted theft. Each question bore on the defendant's credibility, but only the question in the *Hale* case dealt with a fact relating to the defendant's guilt of the crime charged.

[10]The instruction given in Hale's trial (quoted in the dissent in *United States* v. *Anderson*, *supra* at 1046) is quite similar to that given here.

(1975). The United States Supreme Court has not concluded yet that constitutional error can never be harmless beyond a reasonable doubt where in similar situations there are forceful instructions which are designed to cure the error.

Prosecutorial indiscretions involving cross-examination about a witness's silence while in police custody have not been a source of a significant number of appeals in recent years in this Commonwealth, and, in those recent cases where the issue has arisen, reversal of a conviction has been the consequence. See *Commonwealth* v. *Bennett*, ____ Mass. App. Ct. ____ (1974) [Mass. App. Ct. Adv. Sh. (1974) 915]; *Commonwealth* v. *Morrison*, ____ Mass. App. Ct. ____ (1973) [Mass. App. Ct. Adv. Sh. (1973) 749]. Prosecutors run a substantial risk of thwarting their own goals by initiating any cross-examination concerning witnesses' silence while in custody. In this case, however, the circumstances do not call for us to invoke an inflexible rule of general application or justify a conclusion that there was reversible, constitutional error.

3. The defendant challenges the judge's charge to the jury that the victim's consent to an "unnatural and lascivious act" was immaterial in determining whether the crime was committed. The case was tried before our decision in *Commonwealth* v. *Balthazar*, ____ Mass. ____ (1974) [Mass. Adv. Sh. (1974) 2001], which concluded that a consensual act was not a crime under G. L. c. 272, § 35.

Although the transcript shows that the defendant's counsel was aware that the *Balthazar* case had been argued in this court by a representative of his office two days before the judge charged the jury in this case, the defendant took no exception to the judge's charge, made no request for instructions consistent with the view he now

asserts, and, in fact, stated that he was content with the charge. In this situation, we see no basis for permitting the defendant to object here for the first time to the charge as given. *Commonwealth* v. *Balthazar, supra* at ____ [Mass. Adv. Sh. (1974) at 2007].

4. The defendant's final contention is that the statutory prohibition in G. L. c. 272, § 35, against "unnatural and lascivious" acts is unconstitutionally vague and that his motion for a directed verdict should have been allowed as to the indictment based on § 35. The defendant recognizes that this issue was decided adversely to his position in *Commonwealth* v. *Balthazar, supra,* but raises it "to preserve the issue for further proceedings, if necessary." In this respect, we point out that the defendant has not argued to us that § 35 is unconstitutionally vague as interpreted by us in the *Balthazar* case.

Judgments affirmed.